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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 49246-6-II
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NEIL R. BECK, *APPELLANT*,

v.

GLACIER NORTHWEST, INC., *RESPONDENT*.

REVISED BRIEF OF APPELLANT

BUSICK HAMRICK PALMER PLLC
STEVEN L. BUSICK
Attorneys for Appellant/Plaintiff

By Steven L. Busick, WSBA #1643
Busick Hamrick Palmer PLLC
PO Box 1385
Vancouver, WA 98666
360-696-0228

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ASSIGNMENT OF ERROR

The trial court erred in giving jury instruction No. 5 that special consideration should be given to the testimony of an attending physician.

Issues pertaining to the Assignment of Error.

1. Whether the trial court abused its discretion in giving Instruction No. 5?
2. Was the appellant, Neal Beck, prejudiced by the giving of Instruction No. 5 proposed by the Respondent, Glacier Northwest, Inc.?

STATEMENT OF THE CASE

Neil Beck was a concrete mixer truck driver for Glacier Northwest, Inc., working out of a concrete batch plant in Woodland, Washington, at the time of his injury on May 17, 2005. Mr. Beck was 42 years old. On that day he was sitting on a high four-legged stool in the batch shack waiting for a print ticket for delivery to come through from Glacier Northwest offices in Vancouver, Washington. Mr. Beck was sitting on the stool with his legs wrapped around the uprights, and his feet tucked underneath the round bar that goes around the base of the stool. The batchman, Craig Marshall, came up behind him, grabbed Mr. Beck in a bear-hug around his arms and chest,

squeezed and turned him to the right, and forced him down to the floor. There was a counter top in front of him, and as Mr. Beck was coming down, he caught his left hand and twisted his torso back to the left. Mr. Beck's head came within 18 inches of the floor, when Craig Marshall then brought him back to an upright position with Mr. Beck's legs still wrapped around the uprights. (Clerk's Papers, No. 6, Certified Appeal Board Record, Mr. Beck-Direct, May 29, 2014, page 7, lines 11 and 13; page 8, lines 3, 14, 19, 21, 23, and 26; page 9, lines 6, 20, 24 and 26; page 10, lines 2, 5, 12, 15, 17 and 22; and page 11, lines 3, 5, 7 and 9).

Afterwards, Mr. Beck felt like he had been punched in the stomach, but went out and made his delivery, came back, and put his head down on the desk in the breakroom. The next day Mr. Beck came to work at 7:00 a.m. in a lot of pain, and left to go to Kaiser Permanente where he saw Dr. Martinson, an occupational physician. Dr. Martinson diagnosed a thoracic sprain/strain, prescribed Vicodin for pain and Flexeril, a muscle relaxer, and took Mr. Beck off work for 5 days. When he returned to Dr. Martinson, Mr. Beck was given a work release, and he returned to work. In August 2005, Mr. Beck was feeling no better and started treatment with a chiropractor in Woodland, Washington, through May 2006, twice a week. (CP, No. 6, CABR, Mr. Beck-Direct, May 29, 2014, page 8, line 5; page 11,

lines 16, 19, 22 and 26; page 12, lines 6, 8 and 10; page 16, line 4; page 17, lines 15, 17 and 19; page 18, lines 14, 17 and 25; and page 19 lines 10, 16, 18 and 22).

Mr. Beck last worked for Glacier Northwest in September 2006. He then worked for Penske Logistics, delivering and installing appliances for 5 weeks, Jet Delivery Services, a light delivery company in Portland, Oregon, and then moved to Alaska. In Cordova, Alaska, Mr. Beck worked for the Reluctant Fisherman Lodge doing maintenance from June 2007 to July 2008, and worked for Alaska Marine in Cordova as a truck driver for 3 months. Then in April 2009, Mr. Beck went to work for Ocean Beauty in Nikiski, Alaska, hauling fish from canaries to barges two miles away. Mr. Beck had to attach 1-1/2 inch thick cables to hook onto a crane reaching overhead, which caused pain in his mid-back, and he only lasted 3 days. Mr. Beck has not worked since April 29, 2009. (CP, page 6, CABR, Mr. Beck-Direct, page 20, lines 2 and 9; page 26, lines 4, 8 and 10; page 23, line 9; page 64, lines 15, 17, 19, 21 and 23; page 65, lines 3, 5 and 7; page 66, lines 14, 19, 21 and 24; and Cross, page 86, line 18; page 87, lines 15, 18 and 23; page 88, lines 11 and 17; page 89, lines 8 and 11; and page 90, lines 9, 12, 15 and 18).

His worker compensation claim had been closed on September 2, 2008, and on June 15, 2009, Mr. Beck saw a Dr. Duddy in Anchorage, Alaska. Dr. Duddy did not treat injured workers, but was willing to file an application to reopen Mr. Beck's worker compensation claim. While Mr. Beck's application to reopen his claim was pending before the Board of Industrial Insurance Appeals and Superior Court of Cowlitz County on Glacier Northwest's appeal, Mr. Beck was not able to receive treatment under his claim. After Mr. Beck prevailed on appeal, the Department of Labor and Industries reopened his claim, and Mr. Beck started treatment with Dr. Jessen in Soldotna, Alaska, after having moved to Sterling, Alaska, in the interim. Dr. Jessen commenced treating Mr. Beck on April 14, 2011, for thoracic spine and sternum pain. Mr. Beck was having excruciating back pain, chest pain and left leg pain, which brought tears to his eyes. The pain felt like Mr. Beck was being stabbed in the back between his shoulder blades from back to front. (CP, No. 6, CABR, Mr. Beck-Direct, May 29, 2014, page 17, lines 1 and 6; page 28, lines 21 and 24; page 29, lines 4, 6, 8, 12, 14, 18, 24 and 26; page 31 lines 5, 7 and 11; and Cross, page 90, line 24; and page 91, line 20).

Dr. Jessen is a neurologist who prescribed antidepressants and treated Mr. Beck for 4 months. She also referred him to Dr. Kahn, a pain

management doctor in Soldotna, who performed an epidural injection in the thoracic area which lasted for 2 weeks. Mr. Beck also saw Dr. Zahn, a spine surgeon at Harborview Medical Center in Seattle. Dr. Zahn reviewed Mr. Beck's MRI on a flat-screen television with Mr. Beck, and showed him 2 thoracic discs where the tears were and fluid was leaking out, but surgery was not an option where the discs were located in the thoracic spine. In August 2012, Mr. Beck moved with his family to Sequim, Washington. When Mr. Beck moved back to Washington, he was assigned a nurse case manager, Ms. Porter, by Eberle Vivian, the private claim administrator for Glacier Northwest. Not having a doctor to treat him in Washington, Ms. Porter found Dr. Guy Earle for Mr. Beck. (CP, No. 6, CABR, Mr. Beck-Direct, May 29, 2014, page 25; lines 3, 5, 11 and 14; page 31, lines 18 and 22; page 32, lines 1, 3, 11 and 19; page 33, lines 1, 16, 18 and 21; page 34, lines 10, 12, 14, 18, 20, 22, 24 and 26; page 35, lines 2, 10, 24 and 26; page 36, lines 23 and 25; page 37 lines 9, 19 and 26; and page 38, lines 2, 5, 8, 11, 13 and 15).

Dr. Guy Earle practices in Silverdale, Washington, and treats injured workers. He is Board Certified in family medicine, but not in occupational medicine. Dr. Earle saw Mr. Beck on 3 separate occasions commencing September 6, 2012. Dr. Earle acknowledged that an MRI of the thoracic

area of Mr. Beck showed annular tears in 2 discs where fluid was leaking out. Mr. Beck was taking hydrocodone for pain control, as well as a numbing patch which Mr. Beck would put on his back. Dr. Earle conducted a physical examination of Mr. Beck on that first visit, and noted his posture was flexed, or bent forward, and Mr. Beck had straightening of the curve in his upper back. On palpation, Dr. Earle found muscle spasm and tenderness in the mid-thoracic paraspinal muscles. With rotation, Mr. Beck was limited to 20-25°, where most people can do at least 30°. Testing his back strength, Dr. Earle found weakened back muscles, and difficulty tightening his back muscles. Dr. Earle noted muscle strength at 4 over 5, where 5 over 5 is full muscle strength. (Clerks' Papers No. 6, CABR, Dr. Earle-Direct, July 22, 2014, page 6, line 11; page 11, lines 7, 16 and 19; page 13, line 1 and 25; page 15, lines 11, 15 and 24; and page 16, lines 9 and 25).

Dr. Earle diagnosed Mr. Beck with a thoracic sprain injury, and diagnosed annular tears at T 5-6 and T 6-7, likely producing chronic discogenic pain. Dr. Earle saw Mr. Beck back on September 20, 2012. He was sleeping better with Nortriptyline prescribed by Dr. Earle, but in the morning he would have stiffness in his back again. On physical examination, Dr. Earle found tenderness and spasm in the mid and lower thoracic paraspinal muscles, and muscle strength still reduced to 4 over 5.

Dr. Earle reviewed a job analysis for concrete mixer truck driver and disapproved the job for Mr. Beck. The material handling aspects of the job, lifting and carrying up to a 50 pounds, Dr. Earle determined that Mr. Beck could not do. (CP, No. 6, CABR, Dr. Earle, July 22, 2014, page 16, line 25; page 20, lines 19 and 22, page 21, line 8, page 36, line 8; and cross, page 50, line 14, 18 and 21).

Dr. Earle saw Mr. Beck back on October 4, 2012, for the third and last time. Mr. Beck stated that he was unable to decrease his morning Hydrocodone as recommended by Dr. Earle, because his pain was too intense. Mr. Beck insisted that there was something wrong with his back, and something else needed to be done. Mr. Beck presented a brochure to Dr. Earle from North Pacific Spine Surgery Center in Houston, Texas, where they do laser surgery on leaking discs. Mr. Beck asked Dr. Earle whether he could help him obtain a new MRI for consideration of laser surgery. Suddenly things went south with Dr. Earle. Dr. Earle was not happy about the prospect of laser surgery. Dr. Earle then terminated the doctor/patient relationship with Mr. Beck, and said Mr. Beck would be receiving a letter to that effect. (CP, No. 6, CABR, Dr. Earle-Cross, July 22, 2014, page 51, lines 21 and 23; page 52, line 6; page 52, line 6; page 53,

lines 19 and 25; and Mr. Beck.-Direct, May 20, 2014, page 39, lines 6, 10, and 14; page 47, line 5; and page 50, lines 1, 7 and 12).

Dr. Earle then on December 3, 2012, two months after he had last seen Mr. Beck and terminated their relationship, was presented with the same Job Analysis for concrete mixer truck driver that he had disapproved previously, Mr. Beck's job at injury, and Dr. Earle approved it without limitations. Dr. Earle was the only doctor who had treated Mr. Beck to testify before the Board. Douglas Bald, MD, a board certified orthopedic surgeon from Portland, Oregon, who had conducted an independent medical examination of Mr. Beck at the request of the employer on October 29, 2009, testified for the employer, along with James Harris, MD, a board certified orthopedic surgeon from Bremerton, Washington, who had conducted an independent medical examination on November 15, 2012. (CP, No. 6, CABR, Dr. Earle-Cross 7-22-14, page 50, line 4; Mr. Beck,-Direct, page 39, lines 6, 10 and 14; page 47, line 5; and page 50, lines 1, 4 and 12).

Dr. Thomas Gritzka, who is a board certified orthopedic surgeon, and was Mr. Beck's only medical witness, had conducted independent medical examinations of Mr. Beck on October 10, 2006; December 22, 2009, and February 12, 2014. Each time Mr. Beck's primary complaint was

mid back pain, focused on the junction between the cervical and thoracic spine, and deep seeded sternal pain, like being stabbed or shot with an arrow from the back with the point coming through the sternum. Mr. Beck's pain was 7 on a pain scale of 0 to 10 each time Dr. Gritzka saw him. When Dr. Gritzka saw Mr. Beck on October 10, 2006, Dr. Gritzka diagnosed chronic thoracic sprain with probable interspinous ligament rupture. Judging from Dr. Gritzka's physical examination and his complaint of stabbing pain back to front, Mr. Beck probably had torn ligaments. (CP, No. 6, BFEA, Dr. Gritzka-Direct, page 14, line 15; page 15, line 17; page 16, lines 9, 15 and 25; and page 19, line 4).

When Dr. Gritzka saw him back for the second time on December 15, 2009, for reopening of his claim, Mr. Beck was living on the Kenai Peninsula, and Dr. Gritzka saw him in his Anchorage, Alaska, office. Mr. Beck had an MRI of the thoracic spine on June 23, 2009, which showed a disc herniation of T 6-7 impinging out the front of the spinal cord on the left, causing mild flattening of the spinal cord. Then when Dr. Gritzka saw him back on February 12, 2014, an MRI of April 29, 2013, showed that in addition to the previous MRI, Mr. Beck had developed a disc herniation at T 4-5 and bony spurring of T 5-6. (CP, No. 6, CABR, Dr. Gritzka-Direct, page 20, line 13; page 26, line 5; and page 27, line 9, 12 and 22).

On physical examination on February 12, 2014, Dr. Gritzka noted that Mr. Beck was 5 feet 6 inches tall, weighed 210 pounds, and was now 50 years old. He had significant round back in the thoracic region, as measured by the dual inclinometer technique of 60 degrees, the upper limits of normal. The thoracic paravertebral muscles in the mid portion of the thoracic spine from T 5 through T 7, were hypertonic or tight, and in spasm when compared to the muscles above and below. Dr. Gritzka diagnosed chronic mid back sprain, and T 6-7 intervertebral disc herniation to the left, compressing the thecal sac and spinal cord, and caused by the industrial injury of May 17, 2005 (CP, No. 6, CABR, Dr. Gritzka-Directed, June 19, 2014, page 36, lines 7, 10 and 15; page 38, line 4; page 44, line 7; and page 45, line 12).

Dr. Gritzka concluded that doctors do not know what is wrong with Mr. Beck's mid back, and do not have objective data as to what his residual functions are. Based on reasonable medical probability, Mr. Beck has not reached maximum medical improvement. If Mr. Beck has a more specific diagnoses, treatment could be directed towards something more than just covering his pain. Mr. Beck needs flexion extension x-rays of the thoracic spine, and a performance based physical capacity evaluation to determine

what he is capable of doing. (CP, No. 6, CABR, Dr. Gritzka-Direct, page 46, lines 11 and 25, and page 47, lines 11 and 18).

Dr. Gritzka also concluded that Mr. Beck was probably unable to work from June 15, 2009, through April 13, 2011, while his reopening application was pending, and December 4, 2009, through May 10, 2013, when the Department of Labor and Industries last acted upon his claim. To return to work as a concrete truck driver was contraindicated. A concrete truck driver job is in the heavy category of the United States Department of Labor Dictionary of Occupational Titles as to all concrete truck drivers Dr. Gritzka has evaluated. The job analysis for concrete truck driver with Glacier Northwest is described as being in the medium category of work which is lifting up to 50 pounds occasionally, or up to 1/3 of the work day, and Mr. Beck cannot do that. Mr. Beck also cannot work as a delivery person on local routes, as any truck driving is not appropriate for him based on the abnormalities in his mid-thoracic spine. (CP, No. 6, CABR, Dr. Gritzka-Direct, page 52, lines 2, 14, and 24; and page 54, lines 13 and 20).

Following a full evidentiary hearing before an Industrial Appeals Judge of the Board of Industrial Insurance Appeals, the judge issued a Proposed Decision and Order denying Mr. Beck relief. Mr. Beck filed a

Petition for Review to the Board, the Board granted review and entered a Decision and Order denying Mr. Beck relief. Mr. Beck appealed to Superior Court for Cowlitz County, and the case proceeded to trial before a 6-person jury. The trial judge, over objection of Mr. Beck, instructed the jury that special consideration should be given to the testimony by an attending physician. Instruction No. 5, Appendix A, as proposed by Glacier Northwest, and the jury returned a unanimous verdict in favor of Glacier Northwest. Judgment was entered on the verdict and Mr. Beck appealed to the Court of Appeals. (CP, No. 6 CABR, pages 124-136, pages 91-121, pages 3-6, and CR Nos. 14 and 24).

ARGUMENT

Generally the trial court has discretion as to whether to give a particular jury instruction. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). However, a trial court abuses its discretion if it based its ruling on an erroneous view of the law. *Wash. State Physicians Ins. Exch. & Assn v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Where the decision of the trial court is a matter of discretion, it will be disturbed on review where there is a clear showing of abuse of discretion; that is discretion manifestively unreasonable, or exercised on untenable grounds

or for untenable reason. State ex. rel. *Carrol v. Junker*, 72 Wn.2d 12, 26, 482 P.2d 775 (1971). The more familiar formulation of the test for determining whether an action is an abuse of discretion, is whether the action was taken without regards the attending facts or circumstances, *Samantha A. v. D'HL*, 171 Wn.2d 623, 645, 256 P.2d 1138 (2011); *Wash. Indep. Tel. Ass'n*, 148 Wn.2d 887, 64 P.3d 606 (2003).

Clark County v. McManus, 185 Wn.2d 466, 372 P.3d 764 (2016), held that the special consideration of the attending physician instruction should be given, except in those cases where there are articulable reasons for not accepting the attending physicians testimony, citing *Hamilton v. Department of Labor and Industries*, 111 Wn.2d 569, 461 P.2d 618 (1988). Here, Mr. Beck took exception to the trial court giving of Instruction No. 5, the attending physician instruction, Appendix A. Dr. Guy Earle, who was the only doctor who testified who could be considered an attending physician, had fired Mr. Beck as a patient on October 4, 2012, and then on December 3, 2012, concluded that Mr. Beck could return to the job at injury of concrete mixer truck driver without restriction, (RP, page 1).

The trial court took the position that it was required to give the attending physician instruction in every case regardless of the circumstances; if it's an L&I case, then this must be given; (RP, page 2).

Under the Industrial Insurance Act, Title 51 RCW, the definition of an “attending Physician” is a physician who “*actively* treats an injured or ill worker.” WAC 296-20-01002. Since Dr. Earle was no longer treating Mr. Beck as of October 4, 2012, the attending physician instruction should not have been given. The trial court would not accept the articulated reasons why the instruction should not be given in this particular case constituting an abuse of discretion.

The language of the attending physician instruction is an accurate statement of both the letter and spirit of the law regarding the Industrial Insurance Act. The act is a unique piece of the legislation, remedial in nature, and the beneficial purposes of the Act should be liberally construed in favor of the injured worker. *Hamilton v. Labor & Indus.*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988). Where the attending physicians’ instruction does not benefit the injured worker, and can be used against him or her, which is the case here, the instruction should not be given.

The trial court must only give a jury instruction supporting a party’s theory of the case so long as there is substantial evidence to support it. *Nessen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). Since Dr. Earle had already fired Mr. Beck as a patient, one month after commencing treatment, his instruction should not have been given, and

it was error of law to give the instruction. The trial court here failed to do what was right under the circumstances. *Carroll v. Junker*, 79 Wn.2d at page 26.

Mr. Beck was prejudiced by the giving of the attending physician instruction. In defendant's closing argument, counsel early on begins emphasizing that Dr. Earle, who testified for the self-insured employer, is the attending physician:

But we've already asked the attending physician – Dr. Earle – and he's like, no it's – it's – it's – its' not recommended. And- and above that he's the attending physician.

So now the law about the attending physician – the reason they're entitled to special consideration under the law is because the law views attending physicians as people who have seen you on more than one occasion and are treating you.

And so the law presumes that they know you pretty well. They know you pretty well – that's your – that's your – that's your doctor. Your doctor probably knows you better than the IME examiner. That's what the law says. Or it doesn't say it – it's just what is being implied.

But what it does say is that you have to give the attending physician special consideration and that's a concept in the law that is difficult for anyone to really wrap their mind around because it says well you don't give more weight or credibility – but you have to listen to their opinions. So here Dr. Earle – who testified on behalf of the employer – is the attending physician.

RP, page 34, line 18, through page 35, line 12.

Mr. Beck's one expert witness was Thomas Gritzka, MD, an occupational orthopedist, who had conducted three independent medical examinations and supported payment of back time loss benefits and permanent total disability which was at issue, as well as further treatment. Dr. Gritzka was not an attending physician, and there was no contention that the court's instruction No. 5 applied to him. In closing argument, employer's counsel distinguished Dr. Gritzka from Dr. Earle:

So who is Dr. Gritzka? Well he's that doctor that has a fancy Harvard undergrad and medical degree. But he saw the claimant at the request of the lawyer all three times – all three times.

Now there may or may not be bias there – that's up to you guys to decide. But he didn't treat him. He didn't have a doctor-patient relationship. It's the lawyer asking the doctor to see Mr. Beck – wonder what that was for.

RP, page 47, line 19, through page 48, line 1.

Again counsel emphasizes that Dr. Earle is the only attending physician to testify and he is entitled to special consideration:

So let's switch over now. Let's talk about the evidence for my client, Glacier. So we have Dr. Guy Earle – the attending physician – entitled to special consideration – that's my argument – he's the attending physician and under the law he gets special consideration. I know of no distinction that would to entitle him to that.

RP, page 50, line 22, through page 51, line 2.

Glacier Northwest is relying upon the instruction No. 5 arguing their case to the jury, and Mr. Beck was prejudiced by the trial court giving the attending physician instruction to the jury.

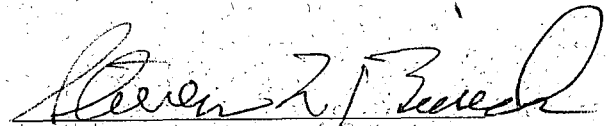
ATTORNEY FEES

Mr. Beck maintains that if he prevails on appeal and on retrial in Superior Court, pursuant to RCW 51.32.130, he should be awarded his reasonable attorney payable by the self-insured employer, Glacier Northwest, Inc.

CONCLUSION

The trial court erred in giving instruction No. 5 to the jury, requiring special consideration be given to testimony of an attending physician, and the case should be remanded to trial court for retrial.

Dated: December 28, 2016.

A handwritten signature in black ink, appearing to read "Steven L. Busick", is written over a horizontal line.

Steven L. Busick, WSBA No. 1643
Attorney for Neil Beck, Appellant

INSTRUCTION NO. 5

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve such testimony. It does require that you give any such testimony careful thought in your deliberations.

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GLACIER NORTHWEST, INC.,

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COA No. 49246-6-II

DEPUTY


PROOF OF SERVICE

The undersigned states that on December 28, 2016, I served via US mail, as indicated below, Corrected Brief of Appellant, as attached, addressed as follows:

Ryan Miller, Attorney at Law
Thomas G. Hall & Associates
PO Box 33990
706 North 182nd Street
Seattle, WA 98133

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: December 29, 2016.


Steven L. Busick, WSBA #1643
Attorney for Neil Beck, Appellant

PROOF OF SERVICE